89-963

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

RONALD ROGERS,

Petitioner,

vs.

COUNTY OF HUMBOLDT, CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Ronald Rogers

QUESTIONS PRESENTED

1. Did the Ninth Circuit err in applying the "deliberate indifference" standard, rather than the "reasonableness" standard adopted by the Fifth and Seventh Circuits, to a pre-trial detainee's claim that medical care he received while incarcerated violated the Fourteenth Amendment? That is, should this Court resolve the conflict in the courts of appeals as to the standard of medical care that must be provided to pre-trial detainees under the Fourteenth Amendment and address the issue left open in *City of Revere v. Massachusettts General Hospital*, 463 U.S. 239 (1983)?

2. If the "deliberate indifference" standard is applied to such claims, does the decision of the Ninth Circuit below reflect a conflict with the decisions of other circuits as to the definition of "deliberate indifference,"

such that this Court should provide guidance to the lower courts by clarifying the meaning of that standard?

3. Did both lower courts misapply Fed. R. Civ. Pro. 12(b)(6) in holding petitioner's pendent claims were untimely?

LIST OF PARTIES

Ronald Rogers, petitioner

County of Humboldt, California, respondent

Neil F. Watter, respondent

Leon W. Pieters, respondent

Humboldt Medical Center-Hoopa, respondent

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Petitioner Ronald Rogers respectfully prays that the United States Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 3, 1989 in the above proceeding.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Ninth Circuit has not been reported. It is reprinted in the appendix hereto, p. A-1, *infra*.

The order of the United States District Court for the Northern District of California (Jensen, J.) has not been reported. It is reprinted in the appendix hereto, p. B-1, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, petitioner brought this action in the Northern District of California. The district court granted respondents' motions for summary judgment on May 16, 1988. Petitioner's motion for relief from judgment was denied on July 6, 1988.

On petitioner's appeal, the Ninth Circuit, on July 3, 1989, entered a judgment and memorandum decision affirming the district court's orders. Petitioner sought rehearing and rehearing en banc on July 14, 1989. Rehearing was denied on September 12, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a suit seeking damages from Neil F. Watter, a county jail physician, and Humboldt County, California for failure to provide petitioner Ronald Rogers with meaningful medical treatment during Rogers' three-week incarceration as a pre-trial detainee at the Humboldt County Jail. Rogers brought this action pursuant to 42 U.S.C. §1983 for denial of his right, under the Fourteenth Amendment, not to be subjected to deliberate indifference to his serious medical needs. Rogers also asserted a pendent medical malpractice against Dr. Watter. The district court dismissed the pendent claim as barred by the statute of limitations and granted summary judgment in favor of Dr. Watter and Humboldt County as to the section 1983 claim. The Ninth Circuit affirmed.

On July 7, 1982, an automobile in which Rogers was riding failed to negotiate a curve on a secondary highway and fell more than 800 feet down a "near vertical cliff," coming to rest upside-down. Nearly 12 hours later, Rogers was treated for scalp lacerations and abrasions on his back by Dr. Pieters of the Humboldt Medical Center. Shortly thereafter, Rogers was arrested for escape from a prison camp and taken to the Humboldt County Jail. From the time of his arrest, during his incarceration at the jail, Rogers was not seen by a physician for three weeks.

When Rogers was booked at the jail, a jail employee noted: "Sore all over body[.] Head injuries w/ stitch[es and] face abrasions."

The next day, Rogers showed a jail physician's assistant bruises and lacerations on his knee, thigh, abdomen

and elbow. Rogers told the assistant that he suffered pain in his neck, head, shoulder, wrist and his eye, which was swollen closed. The physician's assistant reported Rogers' condition to Dr. Watter, the jail physician, apparently including the fact that Rogers had gone "900 feet over embankment." Dr. Watter decided that x-rays would not be necessary and did not examine Rogers. Instead, the physician's assistant prescribed pain medication.

Beginning July 10, 1982, and daily thereafter, Rogers gave written requests to jail guards for medical treatment.

On July 14, 1982, Rogers was seen by another physician's assistant, Robin Jackson. Jackson told Rogers that he was "just a little bruised and sore." When Rogers insisted that he was seriously injured, Jackson responded that

nothing was wrong with him, and explained that "stiffness and soreness is [sic] an expected result of driving a car off of a 900 foot cliff."

On July 16, 1982, Rogers wrote to a county sergeant and complained of inadequate medical treatment. The sergeant replied that he had been told by jail medical personnel that there was nothing wrong with Rogers.

On July 18, 1982, Rogers wrote to the county sheriff and requested medical care. The sheriff wrote: "It seems to be the consensus that there is nothing seriously wrong with him. . . ." On July 23, 1982, Rogers complained to a physician's assistant of continued pain in his spine. On July 27, 1982, Rogers complained to the other physician's assistant of numbness in the back of his head.

Dr. Watter, the jail physician, reviewed the notes of the physician's assistants which reported Rogers' condition, as described above, including the fact that Rogers had driven an automobile "off of a 900 foot cliff." Dr. Watter was aware that, although he was receiving pain medication, Rogers continued to complain of pain. Dr. Watter also knew that Rogers had not been x-rayed or seen by a physician since his arrest. Dr. Watter was not told, however, of Rogers' repeated requests to be examined by a physician.

On July 29, 1982, three weeks after his arrest, Rogers was seen by Dr. Watter. Rogers again complained of numbness in the back of his head and neck pain. Dr. Watter ordered x-rays, which were taken four days later, and which revealed that Rogers' neck had been broken.

In September 1982, Rogers was taken to a California penitentiary. Some time later, prison doctors discovered that Rogers's right hand had also been broken in the July 7, 1982 accident. No x-rays were taken of, and no treatment was provided for, Rogers' hand by Humboldt County medical personnel, despite his complaints of pain, swelling and inability to move his fingers.

Rogers originally filed a *pro se* complaint alleging medical malpractice and violation of his civil rights. Because that complaint alleged that Rogers' injuries were properly diagnosed "upon arrival" of Rogers at the state prison, the district court held that Rogers was on notice to inquire about his malpractice claims as of September 1982 when he was taken to the prison. The district court held that Rogers' medical malpractice claims were barred by the

statute of limitations, California Code of Civil Procedure section 340.5. The district court granted summary judgment in favor of respondents on Rogers' section 1983 claim for failure to provide adequate medical care on the ground that Dr. Watter "did not intentionally deny, delay or interfere with medical treatment." The Ninth Circuit affirmed the granting of summary judgment, stating that Rogers had "failed to establish any specific acts or omissions which sufficiently demonstrate negligence, much less deliberate indifference."

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Use Of The "Deliberate Indifference" Standard For Evaluating The Adequacy Of Medical Care Provided To Pre-Trial Detainees Squarely Conflicts With The Fifth And Seventh Circuits' "Reasonableness" Standards; This Court Should Resolve That Conflict And Address The Issue Left Open In City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983)

When does the level of medical care provided to a pre-trial detainee at a county jail violate due process under the Fourteenth Amendment? This Court left that question unanswered in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243-45 (1983); *see City of*

Canton v. Harris, ___ U.S. ___, 109 S.Ct. 1197, 1204 n.8 (1989). However, as the case at bar demonstrates, the circuits are in conflict as to the level of medical care that must be provided to pretrial detainees. The Court should issue a writ of certiorari to resolve the conflict and provide guidance on this issue.

In *Estelle v. Gamble, 429 U.S. 97, 105 (1976)*, the Court held that state prison authorities violate the Eighth Amendment prohibition of cruel and unusual punishment if the level of medical care provided to an inmate demonstrates "deliberate indifference to [the] prisoner's serious illness or injury." Such conduct gives rise to a cause of action under 42 U.S.C. §1983. As to pretrial detainees, however, the Court has not enunciated the level of medical care that must be provided by jail authorities.

In *City of Revere*, 463 U.S. at 244, the Court stated that pre-trial detainees have a right under the due process clause of the Fourteenth Amendment to proper medical care, and this right is "at least as great as the Eighth Amendment protections available to a convicted prisoner." However, the Court has left open the standard for the medical care that pre-trial detainees are entitled to. *See City of Canton*, ___ U.S. at ___, 109 S.Ct. at 1204 n.8.

The Fifth and Seventh Circuits have enunciated standards for the level of medical care that pre-trial detainees may expect. In *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987), that court stated that detainees are entitled to "reasonable medical care unless the failure to supply that care is reasonably related to a legitimate governmental objective." In *Matzker v. Herr*, 748 F.2d 1142, 1147 (7th

Cir. 1984), the court held that a pre-trial detainee's rights are violated "when a jailer fails to promptly and reasonably procure competent medical aid . . . ."

The Third, Fourth, Ninth and Tenth Circuits apply the Eighth Amendment "deliberate indifference to serious medical needs" standard to pre-trial detainees. *See Boring v. Kozakiewicz*, 833 F.2d 468, 471-72 (3rd Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1298 (1988) (citing cases).

The contrast between the "reasonableness" standards of the Fifth and Seventh Circuits and the "deliberate indifference" standard employed by the Third, Fourth, Ninth and Tenth Circuits is striking. Moreover, if the Ninth Circuit had applied the Fifth Circuit's standard in this case, a different result would have obtained.

In *Thomas v. Kippermann*, 846 F.2d 1009 (5th Cir. 1988), a pre-trial detainee alleged deprivation of prescribed medication. The court of appeals stated:

> Thomas's allegations of denial of reasonable medical care implicate more than mere negligence. Thomas's claim could meet the standard of denial of reasonable medical care if he told jail authorities that he needed his prescribed medication . . . and if they did not have him examined or otherwise adequately respond to his requests.

Id., 846 F.2d at 1011.

Here, petitioner Rogers repeatedly requested to be seen by a physician. In addition, respondents not only knew that Rogers had been in a dramatic automobile wreck, in which his car plunged over a cliff and fell some 900 feet, they knew that Rogers had visible injuries to his head and other parts of his body, and they knew that, despite the prescribed

pain medications, Rogers repeatedly complained of pain. A physician with such knowledge who did not examine his patient for three weeks or refer the patient for x-rays would surely be liable for negligence. More importantly, if that physician was a jail doctor, his conduct would fall below the reasonableness standards adopted by the Fifth and Seventh Circuits. The level of care provided to Rogers, merely a prescription of pain medication, was not, under the circumstances, "reasonable." It is difficult to imagine a reasonable physician determining not to see a patient and examine him for broken bones where he knows the patient has sustained a fall of 800 to 900 feet, the equivalent of falling off of an 80 to 90 story building (albeit in an automobile).

Thus, the different standards adopted by the circuits for medical care

of pre-trial detainees are leading to conflicting case law and results. The Court should grant a writ of certiorari to resolve this conflict and establish a standard for pre-trial detainees under the Fourteenth Amendment which is distinct from the standard applied to prisoners under the Eighth Amendment. As the Fifth Circuit stated in *Cupit*, 835 F.2d at 85, the distinction between the two standards "must be firmly and clearly established to guide district courts in their evaluation of future cases involving the constitutionality of all conditions imposed upon pretrial detainees." Failure to do so will result in citizens who have been convicted of no crime, but who are unable to post bail, being subjected to unreasonable and incompetent medical care, medical care of the lowest level tolerated by our society and its Constitution, in those circuits that con-

tinue to apply the "deliberate indifference" standard.

II.

Even If The Deliberate Indifference Standard Should Be Applied To Pre-Trial Detainees, The Ninth Circuit's Application Of That Standard In This Case Conflicts With Decisions Of Other Circuits

Applying the deliberate indifference standard in this case, the Ninth Circuit stated that Rogers

> failed to establish any specific acts or omissions that sufficiently demonstrate negligence, much less deliberate indifference. . . . We are persuaded that neither Dr. Watter's failure to secure x-rays, nor his failure to personally examine Rogers upon arrival at the Humboldt county [sic] jail, constitute deliberate indifference.

First, this statement demonstrates the court of appeal's failure to apply the correct standard of review to this case. The appeal involved a review of summary judgment. Petitioner had not yet had an opportunity to "establish any specific acts or omissions."

Second, the court of appeals' application of the deliberate indifference standard, and, thus, apparently its understanding of the standard, is in conflict with the manner in which the standard is explained and applied in other circuits.

Reported decisions of other circuits suggest a vastly different approach than that adopted by the Ninth Circuit. The Ninth Circuit opinions reiterate that "deliberate indifference" is something more than "mere negligence" and constitutes the "unnecessary and wanton infliction of pain." *See, e.g.,*

Anthony v. Dowdle, 853 F.2d 741, 742-43 (9th Cir. 1988). However, the Ninth Circuit's decisions go no further in defining the standard.

In contrast, other circuits have further defined the standard by explaining the types of conduct that constitute deliberate indifference. For example, the Third Circuit has stated that deliberate indifference is shown where "prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment." *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979). The Third Circuit has stated that prison officials who opt for "an easier and less efficacious treatment" of an inmate's condition may be guilty of deliberate indifference. *West v. Keve*, 571 F.2d

158, 162 (3d Cir. 1978). Where prison officials know of the need for medical care and intentionally refuse to provide such care, they have acted with deliberate indifference. *Robinson v. Moreland*, 655 F.2d 887, 889-90 (8th Cir. 1981). Similarly, "if necessary medical treatment [i]s . . . delayed for nonmedical reasons, a case of deliberate indifference is made out." *Ancata v. Prison Health Servs.*, 769 F.2d 700, 704 (11th Cir. 1985). A medical need is considered "serious" where it is "so obvious that a lay person would easily recognize the necessity of a doctor's attention," *Pace v. Fauver*, 479 F.Supp. 456, 458 (D.N.J. 1979), *aff'd*, 649 F.2d 860 (3d Cir. 1981), or where the denial or delay of care causes an inmate to suffer a life-long handicap or permanent loss, *Archer v. Dutcher*, 733 F.2d 14, 16 (2d Cir. 1984).

Under the above-cited cases from circuits other than the Ninth Circuit, petitioner would be able to make out a claim for deliberate indifference. Here, the physician's assistants, sergeant and sheriff denied petitioner access to a physician by not telling Dr. Watter that Rogers wished to be seen by a physician and by not asking Dr. Watter to see Rogers. Respondents denied Rogers "access to a physician capable of evaluating the need" for treatment of his broken neck and wrist (*Pierce*). Moreover, respondents opted for the easier and less efficacious treatment of Rogers' injuries (*West*). Respondents chose to simply prescribe pain medication, rather than examine, diagnose and treat his fractured bones.

Respondents delayed treatment of Rogers by a physician for nonmedical reasons (*Ancata*). Those reasons appear

to be strictly budgetary. The delay of treatment resulted from the system of medical care adopted by the jail. The jail had no full-time medical officer. The jail physician visited the jail one afternoon per week. Whether an inmate was seen by a physician was almost entirely dependent upon physician's assistants, who, here, did not even pass along to the jail doctor Rogers' requests to be examined by a physician.

Finally, Rogers' need for medical care was "serious." It was so obvious that a lay person would easily recognize that Rogers should have been seen by a doctor (*Pace*). The nature of the accident, Rogers' visible lacerations and bruises and his persistent pain would suggest to any reasonable mind, whether or not trained in medicine, that a thorough examination for broken bones was necessary. That his injuries were seri-

ous is further shown by the fact that Rogers has suffered permanent impairment of the use of his right hand due to the failure of respondents to examine, diagnose or treat its fracture.

Thus, although the Ninth Circuit's decisions do not adopt definitions of deliberate indifference in conflict with those of other circuits, the decision below, when compared to decisions of the other circuits, demonstrates that the Ninth Circuit implicitly has adopted a different interpretation of "deliberate indifference" than that adopted by several of the other courts of appeals.

In summary, while purporting to apply the same "deliberate indifference" standard, the circuits have adopted conflicting approaches in interpreting and applying the standard. That conflict is demonstrated here by the different result

that would have been reached had Rogers' appeal been heard by the Second, Third, Eighth or Eleventh Circuits. This Court should resolve this conflict by providing additional instruction as to the meaning of "deliberate indifference" to assist bench and bar in the application of this standard.

III.

The Court of Appeals Erroneously Applied Federal Rule of Civil Procedure 12(b)(6) in Holding That Petitioner's Pendent State Claims Are Time-Barred

Rogers' pendent medical malpractice claims were dismissed as time-barred, pursuant to Federal Rule of Civil Procedure 12(b)(6). Both the district court and court of appeals clearly erred, because it does not appear beyond doubt

from the face of the complaint that petitioner's claims were untimely. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1976).

The relevant statute of limitations commences to run when a plaintiff is, or should be, aware of both: (1) the negligent act or omission; and (2) the resulting damaging effect. *Steingart v. Oliver*, 198 Cal.App.3d, 406, 414, 243 Cal.Rptr. 678, 681 (1988); Cal. Code of Civ. Proc. § 340.5.

Both the district court and court of appeals held that the statute of limitations began to run in September 1982. The court of appeals stated that that is when "Rogers was diagnosed by the [California] Department of Corrections as having a 'broken neck, a fractured wrist, and lower back injuries.'"

Nowhere in the record is it stated that Rogers was so diagnosed in

September 1982. Nowhere in the record does it state when Rogers was so diagnosed. Nowhere in the record is it stated when Rogers was told of the proper diagnosis by the state prison of his injuries.

Both lower courts relied exclusively on the allegations in Rogers' initial *pro se* complaint. Paragraph 12 of the *pro se* complaint, which was later amended after counsel was appointed, states: "Upon arrival at The California Department of Corrections plaintiff was examined by various medical technicians and medical personnel where it was ascertained that plaintiff had suffered a 'broken neck, a fractured wrist and lower back injuries.'"

The *pro se* complaint does not allege that Rogers was properly diagnosed in September 1982, or told of the proper diagnosis in September 1982. It does not

even allege that Rogers was taken from the Humboldt County Jail to the state prison in September 1982.

All the *pro se* complaint alleges is that at some time after being taken to the state prison, Rogers was properly diagnosed ("upon arrival"). Both lower courts indulged in pure speculation as to: (1) when Rogers' injuries were diagnosed; and (2) when Rogers was told of the correct diagnoses (and, therefore, was on notice that respondents had failed to diagnose his back and wrist injuries). Neither of these facts appear on the face of the complaint or anywhere else in the record.

Neither court below construed Rogers' *pro se* complaint liberally; in fact, both courts did just the opposite. However, liberal construction is hardly necessary. All that is required is proper application of Rule 12(b)(6). The

face of Rogers' complaint does not show beyond doubt that his medical malpractice claims were untimely, because it does not show when he learned that respondents had misdiagnosed his hand and back injuries.

Both courts below clearly misapplied Rule 12(b)(6). This Court should grant a writ of certiorari to prevent a miscarriage of justice.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted.

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Robert Heuck II

By Robert Heuck
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Attorneys for Petitioner
Ronald Rogers

APPENDIX

F I L E D
July 3 1989
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

N O T F O R P U B L I C A T I O N

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD ROGERS,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 88-15082
v.	)	
	)	
COUNTY OF HUMBOLDT,	)	D.C. No.
et. al.;	)	CV-84-1868-DLJ
NEIL F. WATTER	)	
	)	
Defendants-Appellees.	)	**MEMORANDUM***
	)	

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted June 29, 1989
San Francisco, California

Before: WALLACE, POOLE, and HALL, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Ronald Rogers timely appeals from the denial of his motion for reconsideration in light of new evidence, by which he sought to reopen a judgment of dismissal of his pendent state malpractice claims, and from a grant of summary judgment in favor of the defendants on his claim under 42 U.S.C. § 1983. We affirm.

I.

The district court's denial of appellant's Rule 60(b) motion, for relief from judgment based on the discovery of new evidence, is reviewed for abuse of discretion. Fiester v. Turner, 783 F.2d 1474, 1476 (9th Cir. 1986). A court can grant relief from a final judgment if material, newly discovered evidence could not have been discovered by due diligence in time to move for a new trial. Fed. R. Civ. P. 60(b)(2); see also, Mumford v. Bowen, 814 F.2d 328, 331 (7th Cir. 1986).

The newly discovered 1980 letter, which indicates that Dr. Watter failed to establish written procedures for medical practices at the prison, should have been discovered by exercise of due diligence during the pendency of Rogers' action which spanned from April 1984 to May 1989. Even if we were to find that appellant could not have discovered the evidence, the letter would not have produced a different result as appellant has not specifically alleged that the lack of written procedures actually caused his injuries. We conclude that the district court did not abuse its discretion by denying appellant's motion for relief from the judgment.

II.

Rogers next contends that the district court erred in dismissing his pendent state law malpractice claims as

time-barred.[1] We review de novo the judgment of dismissal entered pursuant to Fed. R. Civ. P. 12(b)(6). Fort Vancouver Plywood Co. v. United States, 747 F.2d 547, 552 (9th Cir. 1984). The parties agree that the applicable statute of limitations is a California statute which requires a malpractice claim to be filed no more than three years after the date of injury or one year after the plaintiff discovers, or through reasonable diligence should have discovered, the injury, whichever occurs first. Cal. Civ. Proc. Code § 340.5 (West 1982).

The district court properly applied the one-year "discovery rule" under which the statute of limitations begins to run when "the plaintiff is rea-

---

[1] Construing the appellant's motion as one brought pursuant to Fed. R. Civ. P. 59(e), the entire underlying judgment is open to appellate review. Fiester v. Turner, 783 F.2d 1474, 1476 (9th Cir. 1986).

sonably aware of the negligent cause as well as the physical manifestation of her injury." Zambrano v. Dorough, 179 Cal. App. 3d 169, 172, 224 Cal. Rptr. 323, 325 (1986); see also, Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1110, 751 P.2d 923, 245 Cal. Rptr. 658 (1988) ("Under the discovery rule, the statute begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, and that someone has done something wrong to her.").

The statute began to run in this case by September of 1982 when Rogers was diagnosed by the Department of Corrections as having a "broken neck, a fractured wrist, and lower back injuries." This undisputedly proper diagnosis should have triggered his suspicions as to possible improper treatment. Although Rogers thus had a duty to begin investigation within one year, see

Guiterrez v. Mofid, 39 Cal. 3d 892, 897, 705 P.2d 886, 218 Cal. Rptr. 313, 315 (1985), he did not file his complaint until April of 1984. We agree with the district court that Rogers' state law medical malpractice claims are time-barred.

III.

As to his claim under 42 U.S.C. § 1983, Rogers contends that summary judgment for the defendants was improper because there are genuine issues of material fact as to whether the defendants acted with deliberate indifference towards his medical needs. We review de novo this summary judgment, viewing the evidence in a light most favorable to Rogers. Ashton v. Cory, 780 F.2d 816, 818 (9th Cir. 1986).

To establish a violation of the eighth amendment prohibition against cruel and unusual punishment, as he must

to maintain his action under section 1983, Rogers must show that defendants acted with deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). "Deliberate indifference" is much more than mere negligence or mistake and involves the "unnecessary and wanton infliction of pain." Wood v. Sunn, 852 F.2d 1205, 1210 (9th Cir. 1988).

Appellant has failed to establish any specific acts or omissions which sufficiently demonstrate negligence, much less deliberate indifference. Doctor Pieters of the Humboldt Medical Center did not believe x-rays were needed. We are persuaded that neither Dr. Watter's failure to secure x-rays, nor his failure to personally examine Rogers upon arrival at the Humboldt county jail, constitute deliberate indifference. Rogers has also failed to establish deliberate indiffer-

ence on the part of the physician's assistants who examined him after consultation with Dr. Pieters, prescribed appropriate medications, and referred Rogers to Dr. Watter for further evaluation after learning that Rogers was experiencing decreased sensation. We find it particularly compelling that the prescriptions and treatment Rogers initially received from the medical staff of the Humboldt County Jail, which he claims were "improper," were not materially different from the treatments he later received from Dr. Farnum after he received x-rays and an undisputedly proper diagnosis.[2/]

---

[2] Appellant also contends that Dr. Watter was deliberately indifferent by failing to supervise the physician assistants. Rogers' failure to establish deliberate indifference on the part of the PA's exempts Dr. Watter from liability for failure to supervise.

The County cannot be liable under section 1983 unless Rogers was deprived of his eighth amendment rights pursuant to a governmental policy or custom. Monell v. Dep't of Social Serv. of N.Y., 436 U.S. 658, 694-95 (1978). This case is clearly distinguishable from Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982). In that case, state prison officials exhibited deliberate indifference because prisoners had no access to medical facilities, and because of the incompetence of the medical personnel. Rogers had full access to competent, medical practitioners and claims only that he received improper treatment. Finally, the argument that Dr. Watter's actions reflected a governmental policy of deliberate indifference is meritless in view of the fact that Dr. Watter's actions did not constitute deliberate

indifference towards appellant's medical needs.

AFFIRMED.

F I L E D
5/9/88
WILLIAM L , CLERK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RONALD ROGERS, Plaintiff, v. COUNTY OF HUMBOLDT, SHERIFF OF HUMBOLDT COUNTY, and NEIL F. WATTER, Defendants.	)	ORDER C-84-1868-DLJ

I.

Defendants' Motion For Summary Judgment came on for hearing on April 27, 1988. Plaintiff appeared through counsel David M. Furbush. Defendants County of Humboldt ("County") and Sheriff of Humboldt County ("Sheriff") appeared through counsel Timothy J. Murphy. Defendant Neil F. Watter ("Dr. Watter") appeared through counsel John M. Vrieze. After

considering the papers, as well as the oral arguments, this Court GRANTS defendants' Motions For Summary Judgment.

II.

Plaintiff filed this action for damages, pursuant to 42 U.S.C. §1983, based on the alleged inadequate medical care he received while he was in the custody of County. Plaintiff alleges that this denial of proper medical care is evidence of deliberate indifference to his medical needs sufficient to establish a cause of action for violation of his Eighth Amendment rights.

a. The underlying facts

On July 7, 1982, plaintiff was injured in a car accident. He was taken to the Humboldt Medical Center in Hoopa County where Dr. Leon Will Pieter sutured a scalp laceration and gave plaintiff a tetanus shot. However, Dr. Pieter did not order any x-rays. He concluded that

plaintiff had not suffered any neurological damage.

The same evening, plaintiff was discharged from the Medical Center into the custody of the Humboldt County Sheriff's Department. Plaintiff remained incarcerated at the County Jail from this date until September 7, 1982.

b. Medical services provided at the County Jail

In 1982, defendant County provided the following medical care for prisoners. Two physician's assistants licensed by the state of California worked five days a week for approximately three to four hours a day. These physician's assistants conducted a daily sick call.

In addition, three licensed vocational nurses worked a total of eight hours a day seven days a week. Finally,

a licensed physician, on call at all times, conducted examinations of prisoners at the jail every Thursday afternoon for approximately four hours. Additionally, this physician reviewed the medical records compiled by the physician's assistants and nurses. During the time period in question, defendant Dr. Neil F. Watter held this position.

An inmate could request medical care by the following procedure. First, the prisoner filled out a request form to be delivered by the guards to the medical personnel. A physician's assistant would examine the prisoner and, in appropriate cases, refer the case to Dr. Watter. Finally, a prisoner could demand to be examined by Dr. Watter.

c. Plaintiff's allegations of inadequate medical care

Plaintiff contends that in his case jail officials did not follow this procedure. However, he cites no specific examples of breach of the procedure. In addition, plaintiff asserts numerous deficiencies existing in the medical care afforded the prisoners.

Specifically, plaintiff states that the physician's assistants were not licensed physicians, that there was no full time chief medical officer, that the procedures followed by the physician's assistants were inadequate, that medicine was not distributed by a physician, that the medical facilities were too small and ill equipped, and that prisoners were not afforded adequate medical care from outside sources because of budgetary concerns.

Plaintiff alleges that a pattern of disregard for his condition began the day after he arrived at the County Jail, on July 8, 1982. On this date, physician's assistant Larry Babb ("Babb") examined plaintiff. According to plaintiff, Babb conducted this examination in a hurried fashion through the bars of plaintiff's cell. Plaintiff contends that the manner of this examination led to an inaccurate and incomplete written report of plaintiff's injuries.

Babb contacted Dr. Pieters at Humboldt Medical Center to discuss the extent of plaintiff's injuries. Dr. Pieters indicated that he had fully examined plaintiff and that his injuries were not serious. Dr. Pieters stated that no x-rays were necessary.

Based on this phone call and his examination, Babb prescribed Parafon Forte, a pain killer, to be administered

four times a day. An infirmary nurse administered the medication for the total period plaintiff remained in the County's custody.

Plaintiff requested further medical treatment soon thereafter. Plaintiff asserts that he made this request within a few days of this initial examination by Babb; defendants assert that plaintiff made the request four to five days after this initial examination.

On July 14, 1982, physician's assistant Robyn Jackson ("Jackson") examined and treated plaintiff. On this date, Jackson removed some of plaintiff's sutures. Plaintiff asserts that he attempted to convince Jackson that he was seriously injured. However, Jackson merely noted in her record that she told plaintiff that such soreness was normal after such a serious accident.

Babb examined plaintiff for a second time some seven to eight days after his initial examination.

Plaintiff asserts that he began to fill out medical request slips and make oral requests for further medical treatment almost every day. Plaintiff has not alleged that he was denied access to these slips nor that these request slips went undelivered. However, plaintiff claims that he did not receive the medical treatment he requested.

Plaintiff then wrote to Sergeant Philip G. Cobine, complaining of inadequate medical care. Sergeant Cobine informed plaintiff that after discussing plaintiff's condition with the medical personnel he was convinced that no further action was required.

Plaintiff then wrote a letter to Sheriff Cox in which he made the same request. According to plaintiff, he

never received a written or oral response to this letter.[1/]

Plaintiff contends that he received proper medical treatment only after receiving a court order. However, there is no evidence that such an order was ever issued. Instead, in a declaration, plaintiff refers to an order made by a Court during a preliminary hearing on an unrelated criminal matter.

On July 23, 1982, Babb examined plaintiff. At this time, plaintiff complained of continued pain in the thoracic spine area. To relieve the pain, Babb prescribed the pain reliever of Zomax.

[1/] Defendant asserts that Sheriff Cox wrote a "memo" to the file on the back of plaintiff's letter stating that he met with plaintiff and indicated to plaintiff that he saw no reason to not follow the doctor's instructions. Sheriff Cox is deceased and cannot attest to his signature. However, his secretary submitted a declaration attesting to his signature at the bottom of this memo.

On July 27, 1982, Jackson examined plaintiff. During this examination, plaintiff complained of decreased sensation in the occipital area. Jackson referred plaintiff to Dr. Watter for further examination.

On July 29, 1982, Dr. Watter examined plaintiff for the first time. Plaintiff complained of decreased sensation in the occipital area and marked pain in the neck. Dr. Watter believed that plaintiff possibly suffered a neck fracture, and ordered x-rays.

X-rays taken August 2, 1982 revealed that plaintiff suffered a compression fracture of the seventh cervical vertebra. After reviewing these X-Rays, Dr. Watter referred plaintiff to Dr. Farnum, an orthopedist. On August 2, 1982, Dr. Farnum examined plaintiff and prescribed a cervical collar.

On August 9, 1982, Jackson examined plaintiff. At this time, plaintiff was not wearing his collar.

On August 17, 1982, plaintiff's Zomax prescription was discontinued and replaced by Synalgos.

Dr. Farnum conducted a follow up examination of plaintiff on August 23, 1982. Dr. Farnum prescribed exercises, use of the collar, and follow-up X-Rays.

III.

a. Standard for violation of constitutional rights

To state a claim pursuant to 42 U.S.C. §1983 for a violation of his Eighth Amendment rights, plaintiff must establish "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 104 (1976). Inadvertence, mistake, or negligence are not

sufficient to state a cause of action for a constitutional violation. Franklin v. State of Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).

Plaintiff does not state facts rising to the level of a constitutional violation. Licensed medical personnel continually examined him, pursuant to established procedure. The jail medical personnel contacted Dr. Pieter, who advised them no x-rays were needed. When Dr. Watter examined plaintiff, he ordered the x-rays. Clearly, the x-rays should have been ordered at an earlier point in time.

However, a failure to order x-rays amounts to at most negligence, and does not suffice to state a claim for cruel and unusual punishment evidenced by deliberate indifference. See Estelle v. Gamble, 429 U.S. at 105-06.

b. The culpability of Dr. Watter

Furthermore, plaintiff can not establish any violation of his constitutional rights by Dr. Watter, who is being sued in his individual capacity. Liability pursuant to 42 U.S.C. §1983 for the deprivation of constitutional rights can only be established as to an individual defendant by showing that the defendant personally participated in the deprivation, or caused such a deprivation to occur. Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981).

The facts of this case point to quite the opposite conclusion. Indeed, as soon as Dr. Watter examined plaintiff, he took appropriate, and as it turned out, correct medical steps. Dr. Watter could not even be said to have acted negligently, nor to have caused anyone else

to have acted negligently.[2/] In no way did Dr. Watter act in a manner which would be violative of plaintiff's constitutional rights. He did not intentionally deny, delay, or interfere with medical treatment. See, Estelle v. Gamble, supra, 429 U.S. at 104-05.

Plaintiff admits that medical malpractice does not suffice as the basis for a §1983 cause of action. Instead, plaintiff argues that the medical treatment afforded to the prisoners at the County Jail demonstrates a policy of deliberate indifference to prisoner's serious medical needs.

[2/] Of course, negligence is not the issue in this suit for a constitutional violation. See, discussion infra. However, this Court raises this point to demonstrate how truly remarkable is plaintiff's argument as to Dr. Watter's culpability.

Accordingly, Rogers requests that this Court find Dr. Watter personally liable for this failure.

Plaintiff cites Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982), in support of this argument. In Hoptowit, the Court held prison officials at a state penitentiary liable in their official capacities for deliberate indifference to prisoners' serious medical needs. The Ninth Circuit accepted the District Court's findings of fact that prisoner medical care was deficient in nine

areas.[3/] Based on these defects, the Court stated that:

> the Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care. Prison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical needs known to the medical staff. Access to the medical staff has no meaning if the medical staff is not competent to examine prisoners and diagnose illnesses. (Citations Omitted) (Emphasis Added)

Id. at 1253. The case at bar is factually distinguishable from Hoptowit. First, the physician's assistants at the County Jail are licensed by the State of

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[3/] These are: (1) Inadequate medical staffing; (2) inadequate organization of the medical care system and few if any written procedures; (3) inadequate access to the medical care system with preliminary diagnoses made without examinations; (4) too much power vested in the guards; (5) medicine distributed by unlicensed persons; (6) medical records system deficient; (7) lack of preventive medical care; (8) medical facilities ill equipped and too small; and (9) lack of basic psychiatric and mental health care programs.

California to perform their services. Second, only nurses dispensed the medicine to plaintiff. Third, plaintiff has not stated any facts to demonstrate that the medical facilities at the County Jail are inadequate. Fourth, plaintiff has not alleged that his requests for medical treatment were completely ignored, only that the treatment was improper. Most importantly, Hoptowit was maintained as a class action, where a long history of inadequate treatment at the prison led to the finding of liability on the part of prison officials in their official capacities. None of the doctors were found liable.

Plaintiff wishes to extend Hoptowit in a manner to find Dr. Watter individually liable for perceived failures in the County Jail's medical procedures. Plaintiff has not asserted any

basis for this extension of official liability to personal liability.

Accordingly, this Court grants summary judgment in favor of defendant Dr. Neil Watter.

c. Liability of the county

The County cannot be held liable for a violation of §1983 merely on the basis of respondeat superior. Instead, Rogers must show that the injury resulted from the implementation of a government policy or custom. See, e.g., Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 659, 694-695 (1978).

Plaintiff has not asserted any facts to support his allegation that the medical treatment afforded to the prisoners at the County Jail was part of a policy of deliberate indifference to the prisoners' serious medical needs. As discussed above, the treatment here is

factually distinguishable from Hoptowit. There is no support for plaintiff's assertion that the County had a policy of supplying inadequate treatment. As such, Summary Judgment is GRANTED in the County's favor.

d. Liability of Sheriff Renner

Two theories are asserted for imposing liability on Sheriff Renner. The first, is that he acted in his official capacity, the second, that he acted in his individual capacity.

For the same reasons articulated infra, no Monell-style liability may be imposed on Sheriff Renner.

Additionally, as discussed above, individual liability for a violation of constitutional rights may only be established when a defendant actually participates in or causes the violation complained of. Harris v. City of Rose-

burg, supra, 664 F.2d at 1125. Sheriff Renner did not assume the position of Sheriff of Humboldt County until some three months after the incidents at issue. Thus, he could not have participated in any of the incidents complained of.

Accordingly, this Court GRANTS summary judgment in favor of defendant Sheriff Renner.

IT IS SO ORDERED.

DATED: May 9, 1988

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge